Filed 12/7/09 Jamgotchian v. Cal. Horses Racing Bd. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JERRY JAMGOTCHIAN, Plaintiff and Appellant, v. CALIFORNIA HORSE RACING BOARD et al., Defendants and Respondents.	B211842 (Los Angeles County Super. Ct. No. BC380314)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael C. Solner, Judge. Affirmed.

Caswell & Associates, Ronald S. Caswell for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, Robert L. Mukai, Assistant Attorney General, Sara J. Drake and Jennifer T. Henderson, Deputy Attorneys General, for Plaintiff and Respondent.

The Bagley-Keene Open Meeting Act (the Act) sets forth basic requirements for open meetings by various state entities, including defendant California Horse Racing Board (the Board), and mandates public access to and an opportunity for participation in the actions of those entities. (Gov. Code, §§ 11120, 11121.)[1] Plaintiff Jerry Jamgotchian appeals the dismissal of his complaint seeking declaratory and injunctive relief on the ground that the Board had repeatedly violated the Act when defendants Richard Shapiro (former chairman of the Board) and Ingrid Fermin (former executive director) curtailed his right to speak and criticize the Board at its meetings. We find that the trial court properly sustained the Board's demurrer, because complete transcripts of the hearings in question (of which the trial court took judicial notice) reveal that Jamgotchian either did speak or was justifiably curtailed from speaking when, for example, he wanted to speak about issues not on the agenda. Jamgotchian thus failed to establish any violations of the Act.

FACTUAL AND PROCEDURAL SUMMARY

Jamgotchian owns many thoroughbred race horses and frequently attends and speaks at Board meetings. As described by his attorney, Jamgotchian is "very involved" and the kind of person "a lot of people would refer to as a gadfly." Excluding the present case, Jamgotchian has filed four lawsuits against the Board, three under the California Public Records Act (§ 6251) and one tort action involving a racing steward. According to the Board, Jamgotchian has made over 100 California Public Records Act requests to the Board and has sent hundreds of e-mails to Board staff, commissioners, and attorneys.

In November of 2007, Jamgotchian filed a complaint against the Board, Shapiro, and Fermin (collectively referred to as the Board), alleging causes of action for declaratory relief and injunctive relief. Jamgotchian sought a declaration that the Board violated the Act when Shapiro improperly cut off Jamgotchian's microphone to stop him from expressing negative opinions about the Board and about Fermin during the public

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[1] Unless otherwise indicated, all statutory references are to the Government Code.

comment portion of the October 18, 2007, meeting, even though Jamgotchian still had two minutes remaining out of his five-minute comment period. Jamgotchian also sought a declaration that the Board may not regulate speech during the public comment session of any meeting based on the content of the speech, as any such regulation would violate the speaker's First Amendment rights. He further sought to enjoin the Board from engaging in similar future conduct, and to recover his attorney fees pursuant to section 11130.5. Jamgotchian's complaint attached selected excerpts of the transcript of the Board's meeting.

The Board moved for judgment on the pleadings, urging in pertinent part that the complaint failed to allege facts sufficient to constitute a cause of action under the Act or to support a request for an injunction. As requested by the Board, the trial court took judicial notice of the complete transcript of the October 2007 Board meeting, as well as photos from several frames of the video of that meeting. The trial court found that Jamgotchian did not allege a present controversy, but granted him leave to amend the complaint.

Jamgotchian's first amended complaint added additional factual allegations setting forth four other incidents at Board meetings prior to the meeting on October 18, 2007. He sought to establish a continuing and ongoing pattern of violations of the Act and thus to justify the declaratory and injunctive relief requested. Jamgotchian's first amended complaint attached selected excerpts of transcripts of the Board's meetings.

The Board demurred to the first amended complaint. The Board argued: (1) that Jamgotchian failed to state facts sufficient to constitute a cause of action under the Act because the facts revealed in the complete transcripts established that he was not prevented from criticizing the Board, (2) that any restrictions on Jamgotchian's speech were not based on the content of his speech, but were based on his deviation from the items on the meeting agenda or were otherwise justified, and (3) that Jamgotchian failed to allege facts sufficient to state a cause of action to justify injunctive relief because there was no past or threatened violation of the Act, and thus no future action to enjoin.

In support of its demurrer, the Board requested judicial notice of the complete transcripts of all the Board meetings complained of by Jamgotchian, as well as judicial notice of transcripts from several other Board meetings. The trial court granted this second and more extensive request for judicial notice.

The trial court then sustained the demurrer without leave to amend and entered a judgment of dismissal. Jamgotchian appeals.

DISCUSSUION

I. The standard of review.

"A demurrer tests the legal sufficiency of the complaint . . . ." (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) On appeal from an order of dismissal after sustaining a demurrer without leave to amend, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We deem to be true all material facts properly pled (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591) and those facts that may be implied or inferred from those expressly alleged (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403).

However, a court will not assume the truth of contentions, deductions or conclusions of fact or law, and we may disregard allegations that are contrary to law, or are contrary to a fact of which judicial notice may be taken. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Thus, "where an allegation is contrary to law or to a fact of which a court may take judicial notice, it is to be treated as a nullity." (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955.) We "will not close [our] eyes to situations where a complaint contains . . . allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

Consistent with the fundamental principle of truthful pleading, a complaint otherwise good on its face can be rendered defective by judicially noticed facts. (*Watson v. Los Altos School Dist.* (1957) 149 Cal.App.2d 768, 771-772; see Code Civ. Proc., § 430.30, subd. (a).) Thus, a demurrer may be sustained on the ground that matters

properly subject to judicial notice show that the complaint fails to state facts sufficient to constitute a cause of action. (See *Saltarelli & Steponovich v. Douglas* (1995) 40 Cal.App.4th 1, 5.)

In the present case, Jamgotchian attached excerpts of the transcripts of the Board's meetings as exhibits to both his original complaint and his first amended complaint. Although the excerpts selected might have supported Jamgotchian's allegations, they were contrary to a truthful pleading in the sense that they did not properly represent how the incidents actually occurred. Viewing the *complete* transcripts of the various Board meetings in their proper contexts, we find that the transcripts contradict the material facts stated in the first amended complaint. These facts revealed in the complete transcripts prevail over the pleaded allegations and, as discussed below, establish facts insufficient to constitute a cause of action based on purported violations of the Act or the First Amendment.

II. The Board, the Act, and applicable First Amendment principles.

The Board is comprised of seven appointed part-time commissioners, and its operations are overseen by an executive director. (Bus. & Prof. Code, §§ 19420, 19421, 19428.) The Board's principal responsibilities are to adopt rules and regulations to protect the public, to control horse racing, to adjudicate controversies arising from the enforcement of the horse racing laws and regulations, to allocate racing dates, and to issue licenses to racing associations, wagering facilities, and participants in horse racing and pari-mutuel wagering. (Bus. & Prof. Code, § 19420; see Cal. Code Regs., tit. 4, div. 4, art. 1.) Issues such as these, as well as reports from staff on matters of current Board concern, typically constitute the business before the Board at its regularly scheduled meetings. The Board generally hears testimony from the necessary parties on an agenda item, such as a license applicant or a Board staff member making a report, and then offers the opportunity for public comment on the agenda item. (§ 11125.7.)

The Board's actions are governed by the Act (§ 11121), the purpose of which is to ensure "that actions of state agencies be taken openly and that their deliberations be conducted openly." (§ 11120.) The Act requires that "[a]ll meetings of a state body shall

be open and public and all persons shall be permitted to attend," except as otherwise provided by the Act. (§ 11123, subd. (a).) Generally, the Act requires state boards and commissions to publicly notice their meetings, prepare agendas, accept public testimony, and conduct their meetings in public unless specifically authorized by the Act to meet in closed session. (§§ 11120-11132.)

To ensure the ability of the public to participate, the Legislature has expressly afforded an opportunity for the public "to directly address the state body on each agenda item before or during the state body's discussion or consideration of the item." (§ 11125.7, subd (a).) In the present case, the Board provided this opportunity, usually at the end of the public portion of the meeting, during what was called the "general comment" period, which was identified as the last item on the meeting agenda, unless the Board had a closed session as the last item on the agenda.

Regarding the opportunity for members of the public to comment, the Act provides that "[t]he state body shall not prohibit public criticism of the policies, programs, or services of the state body, or of the acts or omissions of the state body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law." (§ 11125.7, subd. (c).)

Federal and state law permit reasonable limitations on the public's right to comment at limited public forums, such as during the public meetings of the Board. (See *Madison Sch. Dist. v. Wisconsin Emp. Rel. Comm'n* (1976) 429 U.S. 167, 175.) "'While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, [the public agency] certainly may stop him if his speech becomes irrelevant or repetitious.'" (*Kindt v. Santa Monica Rent Control Bd.* (9th Cir. 1995) 67 F.3d 266, 270.) "[L]imitations on speech at [such] meetings must be reasonable and viewpoint neutral, but that is all they need to be." (*Id.* at p. 271.)

Reasonable, content-neutral restrictions on speech in limited public forums include restricting comments to the subject matter pertinent to the agency, confining meetings to specified subject matter, and limiting the speaking time for public comment. (See *City of Madison Sch. Dist. v. Wisconsin Emp. Rel. Comm'n*, *supra*, 429 U.S. at p. 175, fn. 8;

Baca v. Moreno Valley Unified School Dist. (C.D. Cal. 1996) 936 F.Supp. 719, 729.) Permissible restrictions of that sort also further the agency's "legitimate interest in conducting efficient, orderly meetings." (*Kindt v. Santa Monica Rent Control Bd.*, *supra*, 67 F.3d at p. 271.) And, an agency's presiding officer is afforded a "great deal of discretion" in enforcing the orderly conduct of meetings. (*White v. City of Norfolk* (9th Cir. 1990) 900 F.2d 1421, 1426.)

III. The first amended complaint, considered in light of facts of which the trial court properly took judicial notice, failed to state a cause of action for violation of the Act.

Jamgotchian focuses principally on the October 2007 meeting and contends that the trial court erred when it ruled that the Board did not violate the Act at that meeting. He argues that the "only violation at issue" occurred at the October 2007 meeting, and that the additional incidents pled in the first amended complaint establish a "continuing and ongoing pattern of violations of the Act" that led up to the October 2007 violation and justified the declaratory and injunctive relief he sought. We find no violation of the Act or of Jamgotchian's First Amendment rights at any of the meetings.

A. The October 18, 2007, Board meeting.

Jamgotchian urges that at the October 2007 meeting, Shapiro violated the Act when he stopped Jamgotchian from expressing negative opinions about how Shapiro and Fermin were governing the Board by cutting off Jamgotchian's microphone three minutes into his allotted five-minute public comment period. However, we find that the premature termination of Jamgotchian's maximum permissible speaking time, viewed in the context of the entire meeting, fails to establish any violation of the Act or of his First Amendment rights.

At the outset of the meeting, Shapiro as Board chairman announced that each speaker would be allowed five minutes for public comment for each agenda item. Jamgotchian was present at the meeting and spoke during the public comment section on four of the five separate agenda action items. He also spoke during the general public comment portion of the meeting, which was the last item on the meeting's agenda.

Jamgotchian made numerous comments critical of the Board at the meeting and was not stopped from speaking. He commented on his opposition to heel nerving, a procedure whereby a horse's nerve is severed. The horse can thereafter race only if certain requirements are met, including satisfying the official veterinarian "that the loss of sensation to such horse due to the posterior digital neurectomy will not endanger the safety of any horse or rider." (Cal. Code Regs., tit. 4, § 1850, subd. (a)(1).) Jamgotchian remarked that if the chairman and the Board cared about horses, they would do something about heel nerving. He touted his success in prior litigation against the Board by holding up a large photographic reproduction of a $17,900 check he had been awarded for attorney fees in an action he had brought against the Board under the California Public Records Act, and he sarcastically thanked the Board for the check.

Jamgotchian also blamed the former executive director of the Board for being responsible for the outcome of that litigation, saying "Obviously, it was another lawsuit that was brought on by Ms. Fermin's inability to follow the California Public Records Act." He then asked if the former executive director was retiring or being replaced, and asserted that the Board was in violation of the Brown Act (§ 54950, et seq.) for not reporting the closed session "action" to the public.

After speaking for approximately three minutes during the general public comment section, Jamgotchian began to discuss a horse he owns: "Okay. Well, anyway, with regards to that, there's a horse running today, which I think's got a lot of karma, and it's in the six[th] race, Ingrid The Gambler." At that point, the chairman, as moderator of the meeting, ended the meeting, stating that Jamgotchian "obviously [has] nothing pertinent, which is relevant to Board business." There were no other speakers waiting at the podium, and the Board adjourned. The meeting, which was preceded by an hour-long closed executive session, had lasted approximately two hours 20 minutes.

First, contrary to Jamgotchian's assertion, there is no specific requirement that the Board take a vote to adjourn. The Board may simply adjourn when the meeting agenda is completed. (§ 11128.5.) Most significantly, there was no violation of the Act or of Jamgotchian's First Amendment rights. When the chairman exercised his discretion to

stop Jamgotchian's speech because his comments had become irrelevant and had nothing to do with the issues on the Board's agenda, it was a reasonable, content-neutral restriction on speech to curtail comments beyond the agency's "subject matter." (*Baca v. Moreno Valley Unified School Dist., supra,* 936 F.Supp. at p. 729.)

Jamgotchian urged in his first amended complaint that the statement regarding his horse, Ingrid The Gambler, referred to an "illegal and improper gambling incident involving [Ingrid] Fermin earlier in her career." He asserts that he referred to his horse, which was racing that day, to remind everyone that Fermin had gambled while working as a steward, which had resulted in a monetary sanction being assessed against her by the Board. To the extent Jamgotchian's remark was not just a totally irrelevant remark about a horse he owned running in the sixth race, but rather was an obtuse criticism of Fermin's prior misdeed, such a personal attack on Fermin still had nothing to do with any gambling subject matter currently before the Board.

The purpose and requirements of the Brown Act, which are indistinguishable from the Act under review (see *Southern California Edison Co. v. Peevy* (2003) 31 Cal.4th 781, 799; *Travis v. Board of Trustees of California State University* (2008) 161 Cal.App.4th 335, 342, fn. 7), specifically limit the matters that can be addressed by the public at agency meetings. Discussion by the public is limited to those matters "within the subject matter jurisdiction of the legislative body." (§ 54954.3.) Jamgotchian's obtuse reminder about a Board member's prior sanction for gambling (or, taken literally, the comment about the "karma" of Jamgotchian's horse running in the sixth race) was not within the Board's current subject matter jurisdiction. There is no indication that the Board had any jurisdiction to revisit the propriety of the sanction long ago imposed. Jamgotchian's discussion of it was properly brought to a close.

The First Amendment does not guarantee persons the right to communicate their views "at all times and places or in any manner that may be desired." (*Heffron v. Int'l Soc. for Krishna Consc.* (1981) 452 U.S. 640, 647.) Nor was there any violation of the Act's prohibition on criticism of the Board's "policies, programs, or services . . . or of [its] acts or omissions." (§ 11125.7, subd. (c).)

B. *The January 23, 2007, Board meeting.*

Jamgotchian's first amended complaint also alleged a violation of the Act at the Board meeting of January 23, 2007. As alleged in the complaint, at that meeting "a discussion ensued regarding item 6 of the agenda, whether or not to enforce the prohibition against toe grabs; although Shapiro permitted [Drew Couto] to question the actions of the Board . . . he would not permit [Jamgotchian] to offer a solution to the problem posed regarding the rule." The transcript of the Board's meeting, however, reflects otherwise.

At that meeting of the Board, the transcript reflects that regarding the agenda item concerning toe grabs (i.e., traction devices added to horse shoes), Jamgotchian had already availed himself of the opportunity to comment publicly. The transcript contains approximately four pages of his remarks. At the conclusion of his remarks, the chairman stated, "Thank you very much, appreciate the suggestion." The Board then moved to deliberation on the agenda item, and some uncertainty developed among the Board members as to the procedure, prompting consultation with the Board's counsel, who was in attendance. After clarification regarding the vote, the vote was taken.

At that point, Couto inquired as to the effect of the vote: "Drew Couto, Thoroughbred Owners of America. Can I ask what the effect of that was? Because are you waiving the rule, are you . . . ." The chairman and the Board's counsel then clarified the effect of the vote.

Then, Jamgotchian stated that he wanted to comment on the issue. The Board already having voted, the chairman explained, "[w]e're now done with that item, Mr. Jamgotchian." Jamgotchian persisted, "I understand. But you just asked a question about how the rule can go away, and Ms. Fermin - -" The chairman replied, "We're going to ask staff to initiate the process to repeal the rule." Jamgotchian then continued talking in an effort to offer his solution to the problem, contrary to his allegation in the first amended complaint that he purportedly was precluded from offering a solution. Specifically, Jamgotchian stated at the hearing, "I understand. But you can do it

immediately, just like you repealed 1582." The chairman replied, "It's not on our agenda, we can't do that. Thank you."

The Act requires that the public be given an opportunity to comment on each agenda item. (§ 11125.7, subd. (a).) Jamgotchian had publicly commented on agenda item No. 6 regarding toe grabs. There is no statutory or constitutional requirement that a person be given a second opportunity to comment substantively on the same agenda item during a subsequent procedural discussion after the merits of the agenda item had been fully addressed. Nonetheless, Jamgotchian did indeed persist and offered his "solution" to the procedural issue, suggesting that the rule just be immediately repealed.

Thus, the record establishes that Jamgotchian actually was allowed to do what he claims in his first amended complaint he was not allowed to do. Although not determinative of the agenda item No. 6 issue, we also note that at that meeting Jamgotchian spoke during the public comment opportunity on four other agenda items and also spoke during the general public comment section at the end of the meeting. Thus, during the January 23, 2007, meeting, there was no infringement of his statutory or constitutional right to speak.

C. The February 22, 2007, Board meeting.

Jamgotchian's first amended complaint further alleged that at the February 22, 2007, Board meeting, during the public comment portion of the meeting the chairman would not let him speak on two particular issues. One issue concerned off-track betting, and the other issue concerned heel nerving.

Regarding the off-track betting matter in item No. 9 of the agenda, Jamgotchian alleged in the complaint that the chairman would "not permit [Jamgotchian] to speak once" during the discussion of item No. 9, or to speak "on a new issue raised toward the end of the discussion." On appeal, however, Jamgotchian implicitly acknowledged in his opening brief a factual inaccuracy in the first amended complaint. Jamgotchian does not complain now that he was precluded from speaking even once on the off-track betting issue. Rather, he complains that the chairman would not permit him to "speak a second

time to address newly raised issues" pertaining to off-track betting, although the chairman "invited multiple appearances and comments from Couto on this agenda item."

The transcript of the February 2007 meeting reveals that Jamgotchian initially spoke on the issue and then later attempted to interject during further discussion on agenda item, but that the chairman either did not hear him or chose not to recognize him. As we previously observed, the Act does not require that a board give each person more than one opportunity to speak on each agenda item. (§ 11125.7, subd. (a).)

Later during that same meeting, when the chairman attempted to continue with the agenda, he explained to Jamgotchian that the Board was moving to the next agenda item, that the Board had heard from Couto because he was a party to the matter on agenda item No. 9, and that the Board had already heard from Jamgotchian. Couto represented the Thoroughbred Owners of California, which is a negotiating party to the thoroughbred race meeting agreements. (See Bus. & Prof. Code, § 19613.1, subd. (b).) Couto thus represented a party involved in the agenda item No. 9 off-track betting issue, and the chairman was entitled to exercise his discretion to hear from him to the extent the Board desired assistance in resolving the issue. After explaining the situation to Jamgotchian, the chairman then properly exercised his authority to end comment on agenda item No. 9 and to move on to the next agenda item.

Accordingly, any disparity in the speaking opportunities afforded as to Couto versus Jamgotchian was not inappropriate and not in violation of the Act as to Jamgotchian.

Jamgotchian's first amended complaint also asserted that regarding "heel nerving, the barbaric act of actually cutting a horse's nerve, which is barred by various horse racing jurisdictions, [the chairman] would not permit [Jamgotchian] to comment on his desire to ban this procedure in California because [the chairman] personally supports this procedure." To the contrary, the transcript of that Board meeting reveals that Jamgotchian was indeed allowed to express his views regarding the issue of heel nerving.

At the February 2007 Board meeting, agenda item No. 12 was a report from the medication committee, presented by the Board's Equine Medical Director, Dr. Rick

Arthur. Dr. Arthur addressed several specific equine medical issues considered by the Board's medication committee. When Jamgotchian spoke during the public comment opportunity on the medication committee's report, he asked when heel nerving would be on the next medication committee meeting agenda. The chairman told him it would be on the agenda in March.

Jamgotchian then proceeded to offer his opinion that "the practice of heel nerving is something that's barbaric." He stated, "I'll talk about that in my general comment section, we'll talk deeply about it." The chairman replied, "No, we're not going to talk about it in your general comment section." Jamgotchian repeated that "[w]e'll talk about it," and the chairman again insisted "[w]e will not."

According to Jamgotchian, the above dialogue between him and the chairman constituted a violation of the Act because the chairman would not let him comment on heel nerving because the chairman personally supports the procedure. However, the transcript of the meeting reveals that Jamgotchian's question about when heel nerving would be on the agenda of the medication committee was answered. Also, the agenda item under discussion at the time was not heel nerving and was not part of Dr. Arthur's medical committee report.

Moreover, although the chairman had advised Jamgotchian that he could not address the issue of heel nerving during the general public comment section at the end of the meeting, Jamgotchian thereafter did indeed talk about heel nerving during the public comment section of the meeting. The chairman did not prevent him from speaking about heel nerving and even attempted to answer Jamgotchian's questions on the subject. Jamgotchian was not pleased with the answers and was upset with the lack of protections afforded the horse. He ended his public comment with a reference to litigation he would commence regarding the heel nerving issue and stated, "we'll get those questions answered in a deposition."

Accordingly, the transcript record of the February 2007 meeting reveals that Jamgotchian was not stopped from discussing heel nerving (though it was not an agenda item), and that he spoke about the matter during the general public comment section at

the end of the meeting. Contrary to the allegation in the first amended complaint, there was no violation of the Act.

D. *The March 22, 2007, Board meeting.*

Jamgotchian's first amended complaint further alleged that during the public comment portion of the March 2007 Board meeting, the chairman invited comment only from certain attendees on agenda item No. 6 (concerning breath alcohol testing for jockeys), and refused to let Jamgotchian to speak. Jamgotchian also asserted that a member of the Board (John Harris) had stated that denying Jamgotchian the right to speak was a statutory violation (of the Brown Act, not the Act now under review), but that the chairman ignored this warning.

However, the transcript of that meeting reveals that agenda item No. 6 was deferred. No substantive action was taken on the matter, nor was any public comment opportunity provided at that time. Those who spoke at the March 2007 Board meeting prior to deferral of the agenda item included the relevant Board staff member, Board members, the Board's executive director, the manager of the jockey's union, the representative of the employee's union, and the deputy attorney general—all of whom were in some capacity professionally involved directly in the matter. No members of the public spoke on that agenda item at all.

The matter was not voted on; it was returned to staff for further research. That agenda item was to be put out for 15-day public comment as a proposed regulation, and then it would appear again on another Board meeting agenda for public comment before the Board took any action on it. There is simply no requirement in the Act that the public be provided an opportunity to comment when an agenda item is deferred and no action is taken on the agenda item. Nor is Board member Harris's comment about a statutory violation (of a different statute) of any consequence to our independent determination of the issue.

E. *The September 27, 2007, Board meeting.*

Finally, Jamgotchian alleges in the first amended complaint that the Act was violated at the September 2007 Board meeting when the chairman of the Board "would

not let [Jamgotchian] speak" about the Board's prior failure to comply with the California Public Records Act matters, which led to three prior successful lawsuits by Jamgotchian, and "would not let [Jamgotchian] express his negative opinions about Fermin, claiming they were personnel matters." According to Jamgotchian, the chairman thus precluded him from "publicly criticiz[ing] the performance of a governmental executive" and violated the Act and his First Amendment rights.

On appeal, however, Jamgotchian acknowledges that he was permitted "to express himself in an abbreviated fashion" before the chairman cut him off, and that he commented on Fermin's job performance, but in a "limited" fashion. Indeed, the transcript of the September 2007 Board meeting establishes that although the Board would not enter into a dialogue with Jamgotchian about pending litigation, it did allow him to comment about the litigation. Also during the general public comment period, Jamgotchian offered Fermin a picture of "her horse, Ingrid The Gambler" as a "retirement and going away present." Jamgotchian next wanted to discuss another matter the Board had discussed in closed session—Fermin's performance evaluation. The chairman stated that he could not discuss personnel matters. Indeed, the Act specifically permits the performance of an employee to be discussed by the Board in a closed session. (§ 11126, subd. (a).)

Jamgotchian then continued to discuss various other matters related to the Board, such as heel nerving, and concluded by remarking, "I'm going to give up my 13 seconds in the interest that this Board remove Ms. Fermin as the Executive Director. Thank you." Also, throughout the meeting, Jamgotchian was quite critical of Fermin. For example, he suggested that she had mishandled an important matter by her inaction, and indicated that Fermin had conflicts of interest. It is thus apparent that the Board did not stop Jamgotchian from making "public criticism of the policies programs, or services" of the Board. (§ 11125.7, subd. (c).)

F. Conclusion.

As discussed above, the complete scenario of the events occurring at the meeting were recorded in transcripts, which were judicially noticed and contradict the material

facts stated in the first amended complaint. These facts in the recorded transcripts prevail over the pleaded allegations, and reveal that Jamgotchian was not improperly prevented from making his public comments or from criticizing the Board. Despite claiming a continuing pattern of ongoing violations, the first amended complaint did not successfully plead any violations occurring at the Board meetings.

Accordingly, the first amended complaint failed to establish a violation of the Act or any infringement of Jamgotchian's First Amendment rights. Thus, no controversy existed and no declaratory or injunctive relief was warranted, and the trial court properly sustained the demurrer without leave to amend.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J. CHAVEZ, J.